

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN PACO CAMPOS,

Defendant.

No. 2:08-CR-06088-EFS-1

**ORDER DENYING DEFENDANT'S MOTION
TO VACATE CONVICTION AND FOR
IMMEDIATE RELEASE**

Before the Court is Defendant Juan Paco Campos's Motion to Vacate Conviction in Light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) and for Immediate Release, ECF No. 72. On August 16, 2016, the Court held a hearing on this matter. See ECF No. 82. Ms. Alison Guernsey appeared on behalf of Mr. Campos, who was not present for the hearing, and Mr. Thomas J. Hanlon appeared on behalf of the United States Attorney's Office (USAO). See ECF No. 82. After taking the matter under advisement, the Court denies Mr. Campos's Motion for the reasons articulated below.

I. FACTUAL BACKGROUND

In November 2008, the USAO filed an indictment containing two charges. Count 1 alleged Mr. Campos "did unlawfully take and obtain property consisting of United States Currency, from S.K., an employee of Lucky Food Mart against her will by means of actual and threatened

1 force, violence, and fear of injury, immediate and future, to her
2 person; all in violation of Title 18, United States Code, Section 1951"
3 (Hobbs Act Robbery). ECF No. 1. Count 2 alleged Mr. Campos knowingly
4 discharged a firearm "during and in relation to a crime of violence for
5 which he maybe [sic] prosecuted in a court of the United States, that
6 is, Interference with Commerce by Robbery, in violation of Title 18,
7 United States, Section 1951; all in violation of Title 18, United States
8 Code, Section 924(c)(1)(A)." ECF No. 1.

9 In August 2009, Mr. Campos entered a plea agreement based on the
10 following agreed-upon facts:

11 On September 22, 2008, the Defendant entered the Lucky
12 Food Mart . . . a convenience store [that] provides goods
13 for sale. The goods which are provided for sale travel in
14 interstate commerce.

15 The Defendant approached the store clerk and brandished
16 a firearm. The Defendant demanded that the store clerk hand
17 over money from the register. The store clerk glanced at
18 the Defendant, looked down, and failed to open the register.
19 The Defendant then pointed his firearm at the counter and
20 discharged a round. The round struck the front counter. The
21 store clerk then immediately emptied the cash drawer which
22 contained less than three-hundred dollars. The store clerk
23 handed the money to the Defendant. The Defendant then
24 quickly exited the store, entered his vehicle, and left the
25 area. The entire incident was captured on video tape.

26 . . . [Police] stopped the vehicle and apprehended the
Defendant. Shortly after the arrest, the Defendant was
advised of his Miranda rights. The Defendant waived his
rights and agreed to speak with the law enforcement officers.
The Defendant stated that he had a fight with his girlfriend.
The Defendant stated that he then went to a friend's house
to obtain cocaine. The Defendant stated that he was unable
to complete the cocaine deal, so he went the Lucky Food Mart
and committed a robbery. The Defendant stated that he then
hid the firearm at the home of his friend.

ECF No. 45.

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1 Pursuant to the plea agreement, Mr. Campos pled guilty to Count
2 2, using a firearm in a crime of violence; the USAO moved to dismiss
3 Count 1, the underlying Hobbs Act Robbery charge; and both parties
4 recommended the mandatory minimum sentence of 10 years' imprisonment.
5 ECF Nos. 45, 49 & 51. Finding it to be sufficient but not greater than
6 necessary to serve the goals and purposes of sentencing, the Court
7 imposed a 10-year sentence, noting that "Defendant is an admitted gang
8 member and committed this very serious offense during which he fired a
9 weapon in the direction of an innocent person." ECF Nos. 57 & 58.

10 Mr. Campos now believes he is serving an illegal and
11 unconstitutional sentence. ECF No. 72 at 28. He filed this Motion
12 pursuant to 28 U.S.C. § 2255, and is asking the Court to vacate his
13 sentence and order that he be released. ECF No. 72 at 28.

14 **II. ANALYSIS**

15 **A. Defendant's Collateral Attack Waiver**

16 As a preliminary matter, the Court considers and rejects the USAO's
17 position that Mr. Campos waived the right to bring this Motion in the
18 first place. See ECF No. 77 at 2-3. Mr. Campos's plea agreement did
19 include a provision that waived his right to appeal or collaterally
20 attack his sentence pursuant to 28 U.S.C. § 2255. See ECF No. 45 at 8.
21 Such appeal waivers, however, are not applicable when a defendant's
22 sentence violates the Constitution. See *United States v. Bibler*, 495
23 F.3d 621, 624 (9th Cir. 2007). As Mr. Campos attacks his sentence and
24 underlying conviction on constitutional grounds, the Court will address
25 the merits of his arguments.

26 /

1 **B. Categorical Approach**

2 For Mr. Campos's conviction and sentence to stand, he must have
3 discharged a firearm during and in relation to a "crime of violence."¹
4 See 18 U.S.C. § 924(c)(1)(A)(iii). To determine whether Hobbs Act
5 Robbery constitutes the requisite underlying crime of violence, the
6 Court looks to the "categorical approach" as laid out in *Taylor v.*
7 *United States*, 495 U.S. 575 (1990). See *United States v. Benally*, No.
8 14-10452, 2016 WL 4073316, at *2 (9th Cir. Aug. 1, 2016). Under this
9 approach, the Court cannot look to the particular facts surrounding the
10 conviction, but must instead "compare the elements of the statute
11 forming the basis of the defendant's conviction with the elements of"
12 a crime of violence. *Id.* (quoting *Descamps v. United States*, 133 S. Ct.
13 2276, 2281 (2013)). Thus, to categorically be a crime of violence under
14 § 924(c), Hobbs Act Robbery cannot punish any conduct that falls outside
15 § 924(c)(3)'s definition. See *Benally*, 2016 WL 4073316, at *2.

16 **C. Definition of "Crime of Violence"**

17 As relevant here, "crime of violence" is defined by 18 U.S.C.
18 § 924(c)(3):

19 [T]he term "crime of violence" means an offense that is a
20 felony and--

21
22 ¹ Notably, the statutory language does not appear to require that the
23 defendant have been convicted – or even charged – with a crime of violence.
24 See 18 U.S.C. § 924(c)(1)(A) (applying to "any person who, during and in
25 relation to any crime of violence . . . for which the person may be
26 prosecuted in a court of the United States, uses or carries a firearm")
(emphasis added). However, the Court does not reach whether this
distinction is relevant, as neither party addressed the issue.

- 1 (A) has as an element the use, attempted use, or
2 threatened use of physical force against the person
or property of another, or
3 (B) that by its nature, involves a substantial risk that
4 physical force against the person or property of
another may be used in the course of committing the
offense.

5 Mr. Campos argues that § 924(c)(3)(B) – the “risk-of-force clause”
6 – suffers from the same constitutional infirmities for which the Supreme
7 Court struck the Armed Career Criminal Act’s residual clause in *Johnson*
8 *v. United States (Johnson II)*, 135 S. Ct. 2551 (2015). This Court,
9 however, need not decide whether *Johnson II* renders the risk-of-force
10 clause unconstitutionally vague. Instead, it is sufficient that the
11 Court finds Hobbs Act Robbery qualifies as a crime of violence under
12 § 924(c)(3)(A) – the “element-of-force clause.”²

13 **D. The “Physical Force” Requirement**

14 According to Mr. Campos, the Hobbs Act definition of robbery is
15 too broad to match § 924(c)(3)’s element-of-force clause under the
16 categorical approach. See ECF No. 72 at 9. Specifically, he asserts
17 that Hobbs Act Robbery might be committed without using or threatening
18 “physical force” as required by § 924(c)(3), and posits that Hobbs Act
19 Robbery does not require sufficiently “violent” force in light of
20 *Johnson v. United States (Johnson I)*, 559 U.S. 133 (2010). He also
21 hypothesizes that by placing another in fear of injury to property,
22
23

24 ² The parties refer to § 924(c)(3)(A) and (B) as the “force clause” and the
25 “residual clause,” respectively. See ECF Nos. 72 & 77. However, the Court
26 believes the terms “element-of-force clause” and “risk-of-force clause”
to be more accurate and precise.

1 threatening to poison someone, or by using "minimal force," a defendant
2 might commit Hobbs Act Robbery without needing to threaten or use such
3 physical force. ECF No. 72 at 11-16.

4 **1. Applicability of *Johnson I***

5 In *Johnson I*, the Supreme Court held that "physical force" – in
6 the context of defining "violent felony" under § 924(e)(2)(B)(i) – means
7 "violent force – i.e., force capable of causing physical pain or injury
8 to another person." *Johnson I*, 559 U.S. at 138. Even assuming the
9 *Johnson I* definition of physical force applies here, however, the
10 statutory language, Ninth Circuit case law, and decisions from other
11 jurisdictions make it clear that Hobbs Act Robbery nonetheless
12 constitutes a crime of violence under § 924(c)(3)'s element-of-force
13 clause.

14 **2. The Statutory Language**

15 The statutory language strongly suggests that the type of force
16 required to commit Hobbs Act Robbery qualifies as "physical force" under
17 § 924(c)(3)'s element-of-force clause. After all, the Hobbs Act has
18 its own specific definition of "robbery" in 18 U.S.C. § 1951(b)(1):

19 The term "robbery" means the unlawful taking or obtaining of
20 personal property from the person or in the presence of
21 another, against his will, by means of actual or threatened
22 force, or violence, or fear of injury, immediate or future,
23 to his person or property, or property in his custody or
24 possession, or the person or property of a relative or member
25 of his family or of anyone in his company at the time of the
26 taking or obtaining.

27 This definition is flush with terms that connote close physical
28 proximity and violence; in context, the statute's "actual or threatened

force" or "fear of injury" are clearly envisioned as physical in nature.³ Cf. Black's Law Dictionary (10th ed. 2014) (defining "force" as "[p]ower, violence, or pressure directed against a person or thing" and defining both "actual force" and "physical force" as "[f]orce consisting of a physical act, *esp. a violent act directed against a robbery victim*" (emphasis added)). And because intentionally or knowingly causing physical injury necessarily involves the use of physical force, see *United States v. Castleman*, 134 S. Ct. 1405, 1414, 1417 (2014), it logically follows that even a defendant who used "fear of injury" to commit Hobbs Act Robbery can be said to have "threatened use of physical force against the person or property of another." See 18 U.S.C. § 924 (c)(3)(A).

3. Hobbs Act Robbery in the Ninth Circuit

Perhaps most importantly, Ninth Circuit precedent shows Hobbs Act Robbery includes an element of physical force. Contrary to Mr. Campos's assertions, *United States v. Mendez* does not hold that Hobbs Act Robbery only qualifies as a crime of violence under § 924(c)(3)'s risk-of-force clause. See 992 F.2d 1488 (9th Cir. 1993). Instead, *Mendez* held conspiracy to commit Hobbs Act Robbery qualified as a crime of violence under § 924(c)(3)'s risk-of-force clause; it did not address whether

³ The particular language used in the Hobbs Act to define "robbery" gains even more significance when contrasted with the Act's companion definition of "extortion." For instance, the definition of "robbery" contains words such as "*taking* or obtaining" instead of just "obtaining," "*personal* property" rather than merely "property," and "fear of *injury*" in lieu of simply "fear." Cf. 18 U.S.C. § 1951(a), (b) (emphasis added.)

1 such a *conspiracy* would also fall under the element-of-force clause.
2 See *id.* at 1491. Moreover, *Mendez* shows that commission of Hobbs Act
3 Robbery qualifies as a crime of violence under § 924(c)(3)'s element-
4 of-force clause. The *Mendez* court stated, "Robbery indisputably
5 qualifies as a crime of violence," and specifically cited to Hobbs Act
6 Robbery as "containing [an] element of 'actual or threatened force, or
7 violence.'" *Id.*

8 The bulk of Mr. Campos's arguments were also recently rejected by
9 the Ninth Circuit in the unpublished decision *United States v. Howard*,
10 2016 WL 2961978, *2 (9th Cir. May 23, 2016). In *Howard*, the Ninth
11 Circuit held that Hobbs Act Robbery is categorically a crime of violence
12 under § 924(c)(3)'s element-of-force clause, even if accomplished by
13 means of "fear of injury." See *id.* And though the *Howard* court took no
14 position on whether Hobbs Act Robbery may be accomplished through a de
15 minimis use of force, Mr. Campos has not demonstrated any realistic
16 probability that Hobbs Act Robbery could be committed in such a manner.
17 See *United States v. Hill*, No. 14-3872-CR, 2016 WL 4120667, at *4 (2d
18 Cir. Aug. 3, 2016) ("[T]here must be 'a realistic probability, not a
19 theoretical possibility,' that the statute at issue could be applied to
20 conduct that does not constitute a crime of violence." (quoting *Gonzales*
21 *v. Duenas-Alvarez*, 549 U.S. 183, 184 (2007))).

22 4. Hobbs Act Robbery in Other Jurisdictions

23 Many other jurisdictions also continue to characterize Hobbs Act
24 Robbery as a crime of violence under § 924(c), even after *Johnson II*.
25 For example, The Second Circuit recently indicated it agreed with the
26 Ninth Circuit that Hobbs Act Robbery falls under § 924(c)(3)(A). See

1 *Hill*, 2016 WL 4120667, *7 (citing *Howard*, 2016 WL 2961978). The Seventh
2 Circuit has affirmed the convictions of defendants who pled guilty to
3 Hobbs Act Robbery and brandishing a firearm during a crime of violence.
4 See *United States v. Ikegwuonu*, No. 15-2407, 2016 WL 3228428 (7th Cir.
5 June 13, 2016). The Eighth Circuit has noted more than once that Hobbs
6 Act Robbery falls under § 924(c)(3)(A). See, e.g., *United States v.*
7 *House*, 825 F.3d 381, 387 (8th Cir. 2016). And, according to the Eleventh
8 Circuit, "the substantive offense of Hobbs Act robbery still qualifies
9 as a valid companion conviction notwithstanding *Johnson*." *In re Chance*,
10 No. 16-13918-J, 2016 WL 4123844, at *2 (11th Cir. Aug. 2, 2016).

11 Indeed, in *Hill* – a decision this Court finds particularly well-
12 reasoned and persuasive – the Second Circuit Court of Appeals rejected
13 arguments nearly identical to those made by Mr. Campos. As the court
14 in *Hill* noted, even assuming *arguendo* that *Johnson I* governs "physical
15 force" under § 924(c)(3), it "means no more nor less than force capable
16 of causing physical pain or injury to a person or injury to property;"
17 it encompasses even indirect applications such that it may be
18 accomplished by "threatening to poison a victim, rather than to shoot
19 him." See *Hill*, 2016 WL 4120667 at *5-6; see also *United States v.*
20 *Castleman*, 134 S. Ct. 1405, 1414 (2014) ("[A]s we explained in *Johnson*
21 [*I*], 'physical force' is simply 'force exerted by and through concrete
22 bodies,' as opposed to 'intellectual force or emotional force.' And
23 the common-law concept of 'force' encompasses even its indirect
24 application." (citing *Johnson I*, 559 U.S. at 138)).

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III. CONCLUSION

The Court finds that Hobbs Act Robbery under 18 U.S.C. § 1951(b)(1) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," and thus qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). Therefore, Mr. Campos violated 18 U.S.C. 924(c)(1)(A)(iii) when he discharged a firearm during and in relation to committing Hobbs Act Robbery; his conviction and sentence stand.

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant's Motion to Vacate Conviction in Light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) and for Immediate Release, **ECF No. 72**, is **DENIED**.

2. This file shall be **CLOSED**.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel, the United States Probation Office, and the United States Marshals Service.

DATED this 13th day of September 2016.

____s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge